Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

IN THE SUPREME COURT OF THE UNITED STATES

February Term 1979

No. 78-1220

FREDERICK W. LEY,

Petitioner,

vs.

PETER CATS, DONALD A. ZIMMER, JIMMIE L. RICE, JOHN A. NORRIS, ANTHONY J. WURM, JURGEN H. ROETTER, JACK A. BLOOMFIELD,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION

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BRIEF IN OPPOSITION

Respondents respectfully request this Court to deny the petition for a writ of certiorari seeking review of the Second Circuit's affirmance of an order of the U. S. District Court for the Southern District of New York. That Court's opinion, as yet unreported, is annexed to the petition as Exhibit A.

Question Presented

In this class action, did the Second Circuit Court of Appeals properly affirm the District Court's denial of compensation to the attorney for a class whose claims were dismissed?

Statement of the Case

This statutory interpleader action (28 U.S.C. Sec. 1335) was commenced by the Trustee of an Employees' Retirement Plan Trust to determine which of two diverse groups of employees was entitled to the trust funds. It was duly certified as a class action (Rule 23(b)(1)).

Upon his application, Ley (petitioner here) was appointed the representative of one of the certified classes, and his attorney's (Joseph C. Barton, Esq.) request that he be counsel for the class was granted.

Contrary to his statement (petition p. 3), at no time did Mr. Barton seek a "guarantee of compensation" for acting as such attorney, nor was he ever given such. Indeed, New York law has no such provision.

The claims of the Ley class were ultimately dismissed as a matter of law.

Thereupon Mr. Barton applied for $175,000, as compensation for the services rendered to the losing class represented by him.

The District Court denied the application, and the Circuit Court unanimously affirmed. Each Court came to its respective conclusion as a matter of law—not of fact.

ARGUMENT

1. The Circuit Court affirmed as a matter of law.

In affirming, the Circuit Court properly applied applicable New York law. Neither the District Court nor the Circuit Court was faced with a factual question since Mr. Barton's application, in the first instance, raised only the obvious legal question—whether as the attorney for a class whose claims had been dismissed, he was nevertheless entitled to compensation? In that connection, no factual issue was litigated.

Without exception the courts, in class actions, have denied compensation to the attorney for the losing class. The New York Civil Practice Law and Rules specifically requires success as the basis for a fee award,* and the Federal Courts uniformly are in accord.

Alyeska Pipeline Co. v. Wilderness,
421 U.S. 240 @ 257-258 (1975)

At no time has Mr. Barton ever pointed to a contrary New York or Federal holding.

Nor does New York Civil Practice Law and Rules (Sec. 8303(a)(4)), support Mr. Barton's fee application. That section pertains to an action to construe a will or a trust. But this was never a construction proceeding. There was nothing to construe since there were "no ambiguous words, phrases or provisions."

Kreindler v. Irving Trust Co.
26 A.D. 2d 746 @ 747; aff.
23 New York 2d 785 (1968).

In affirming and applying unquestioned legal principles, the Circuit Court remained well within its jurisdiction, and Mr.

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* "If a judgment in *** a class action is rendered in favor of the class, the court in its discretion may award attorneys' fees to the representative of the class***". ". (N.Y. Civil Practice Law and Rules, Article 9, Rule 909.)

Barton's petition cannot rest on any claim that the Circuit Court exceeded its jurisdictional bounds, or that its affirmance conflicts with any New York State or Federal holding. Thus the cases cited in the petition have no bearing here, and do not sustain it.

2. The Courts below fully considered and correctly denied the fee application.

Even adopting Mr. Barton's reasons for granting his petition, a remand would produce the same result, for the decisions are unanimous, both State and Federal, in holding that, in a class action, the attorney for the losing party is not entitled to compensation. While undoubtedly this proceeding is extremely important to Mr. Barton personally, its overall significance is severely limited. It has been well and carefully considered, and decided by both the District and the Circuit Courts consistent with innumerable decisions.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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February 15, 1979.